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In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEVADA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
CROSS-PETITIONER

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
CAROL E. DINKINS
Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
ROBERT L. KLARQUIST
DIRK D. SNEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a cause of action by the United States and the Pyramid Lake Paiute Tribe of Indians to quiet title in the United States to a reserved right to waters of the Truckee River to maintain historic fisheries in the Truckee River and Pyramid Lake in Nevada for the benefit of the Tribe is barred, under the doctrine of res judicata, by the decree in *United States* v. *Orr Water Ditch Co.*, even where the reserved water right for the fisheries would be satisfied out of water decreed to the United States itself in *Orr Ditch* for reclamation uses having a later priority date.

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BRIEF FOR THE UNITED STATES

STATEMENT

1. Background

a. *The Fishery on the Pyramid Lake Reservation*

This suit was filed in the United States District Court for the District of Nevada on December 21, 1973, to quiet title in the United States to a reserved water right for the maintenance and preservation of historic fisheries along the lower reaches of the Truckee River and in Pyramid Lake in

northwestern Nevada. "The Truckee rises in the High Sierra, flows into Lake Tahoe, through which the California-Nevada boundary runs, exits on the California side of the Lake, and flows 20 miles before crossing into Nevada. It then continues another 65 miles, through Reno and beyond, to its termination in Pyramid Lake, a desert lake 20 miles long and five miles wide, with no outlet and a water level determined by the balance or imbalance between inflow and evaporation." *United States* v. *Nevada*, 412 U.S. 534, 535-536 (1973); see also Pet. App. 18a-183a.[1]

The lower reaches of the Truckee River, the Lake, and the 322,000 acres adjoining them together comprise the Pyramid Lake Indian Reservation. An 1859 Order of the Interior Department reserved this area, "including Pyramid Lake," "for Indian use," and the Reservation was confirmed in 1874 by an Executive Order of the President (Pet. App. 182a, 199a). See 1 C. Kappler, *Indian Affairs: Laws and Treaties* 868-869 (2d ed. 1904). Since its creation, the Reservation has been occupied by respondent/cross-petitioner Pyramid Lake Paiute Tribe of Indians, which is now organized under a tribal constitution approved by the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 987, 25 U.S.C. 476 (Pet. App. 183a).

The circumstances of the establishment of the Reservation make clear that the Lake and the area surrounding it were selected for the Reservation because they embraced "large fisheries" that would help to sustain the Indians. See *United States* v. *Walker River Irrigation Dist.*, 104 F.2d 334, 338 (9th Cir. 1939). Indeed, more than a century ago, the United States District Court for the District of Nevada observed, in sustaining a conviction of non-Indians for fishing on the Reservation without a license: "We know that the Lake was included in the reservation, that it might be a fishing ground for the Indians. * * * It is plain that nothing of value to the Indians will be left of their reservation if

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[1] Maps depicting the area are reproduced at J.A. 511-513. Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the State of Nevada in No. 81-2245.

all the whites who chose may resort there to fish." *United States* v. *Sturgeon*, 27 F. Cas. 1357, 1358 (D. Nev.) (No. 16,413), aff'd, 27 F. Cas. 1358 (1879). Consistent with this view, both courts below in the instant case concluded that one of the purposes of establishing the Reservation was to provide the Tribe with access to Pyramid Lake and the lower reaches of the Truckee River in order that the Indians "might obtain their sustenance, at least in part, from these historic fisheries" (Pet. App. 183a; see also *id.* at 199a). The reserved water right for fishery purposes asserted by the United States in this case is sought to maintain these historic fisheries for the benefit of the Pyramid Lake Tribe.[2]

The water level of Pyramid Lake dropped some 40 feet between 1920 and 1938, reducing the surface area of the Lake by approximately 20,000 acres. Moreover, by 1921, a delta had formed, creating a barrier to migration by the fish. Both of these developments adversely affected the once flourishing fishery (Pet. App. 204a-205a, 208a-209a). By the early 1940's, the Lahontan trout fishery was destroyed. Another species, the cui-ui, barely survived and is now officially classified as "endangered" under the Endangered Species Act of 1973, 16 U.S.C. (& Supp. V) 1531 *et seq.* The Lahontan cutthroat trout, which has been stocked in the Lake since the 1940's, is officially classified as "threatened" under that Act (Pet. App. 208a-209a). See 25 C.F.R. 17.11, at 74-75 (1981).

b. *The Newlands Reclamation Project*

The fisheries' decline stemmed from upstream diversions of Truckee River waters that depleted the flow into Pyramid Lake. The largest such diversion, at Derby Dam, sends a substantial volume of Truckee waters through the Truckee Canal and out of the Truckee watershed to

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[2] The complaint also claimed, *inter alia*, federally reserved water rights for the Stillwater National Wildlife Refuge, with a 1948 priority date, and for Toyaibe National Forest, with priority dates of 1905, 1909, and 1926 (Pet. App. 155a-156a, 159a-160a, 211a). These additional claims were not addressed by the courts below, and they are not at issue here.

Lahontan Reservoir on the Carson River. From Lahontan Reservoir, the commingled waters of the Truckee and Carson Rivers are distributed for irrigation and related uses on lands within the Newlands Reclamation Project.[3] Derby Dam, the Truckee Canal, and Lahontan Reservoir were constructed by the United States as part of the Newlands Reclamation Project (Pet. App. 184a), one of the first projects undertaken pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. (& Supp. IV) 371 *et seq.*

As the district court observed, all of the water users on the Newlands Project "derive their rights from a common source of supply; the diversion by the United States of a quantity of water for use on the Newlands Project" (J.A. 197). The United States acquired its right to divert water from the Truckee River for the Newlands Project by posting notices in 1902 claiming the right to all unappropriated waters in the Truckee and making a specific claim to the use of 1500 cubic feet per second of such waters (Pet. App. 200a). In like fashion, the United States appropriated Carson River waters for use on the project. See *United States* v. *Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 885 (D. Nev. 1980), aff'd, No. 81-4084 (9th Cir. Jan. 24, 1983).

Following established practice under the Reclamation Act, individual water users on the Newlands Project in turn obtained a right to receive project water by filing an application with the Bureau of Reclamation. That application, upon acceptance by the Bureau, became a water right contract between the government and landowner. J.A. 197 & n.2; 34 Interior Dec. 544 (1906); 40 Interior Dec. 641, 669 (1912); *United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093, 1124-1127 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977); *Ickes* v. *Fox*, 300 U.S. 82, 90 (1937). The contracts in effect between the United States and owners of more than 42,000 of the 73,000 acres of land on the Newlands Project for which there are project water rights

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[3] Relatively small distributions for the Truckee Division of the Newlands Project are made by direct diversion from the Truckee Canal before it empties into Lahontan Reservoir.

expressly limit the right to receive project water to no more than 3.0 acre feet per acre annually. *United States* v. *Alpine Land & Reservoir Co.*, *supra*, 503 F. Supp. at 886.[4]

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[4] From the earliest days, the Department of the Interior implemented the Reclamation Act through this system of applications and contracts with individual water users. See generally *United States* v. *Tulare Lake Canal Co.*, *supra*, 535 F.2d at 1123-1131. This procedure was recognized and effectively ratified by Congress. See Section 3 of the Act of Aug. 9, 1912, ch. 278, 37 Stat. 266 (limiting irrigable acreage for which a "water right application" had been made). The provision for the Secretary to set a specific limit on the quantity of water and to ensure that the limitation is specified in the applications was contained in Departmental regulations as early as 1906. 34 Interior Dec. at 545; see also 40 Interior Dec. at 669; 2 S. Wiel, *Water Rights in the Western States* 1292-1294, 1297 (3d ed. 1911). Article 7 of the 1926 contract between petitioner Truckee-Carson Irrigation District ("TCID") and the United States requires TCID to deliver water in accordance with the terms of these individual contracts. Under Article 12 of the 1926 contract, individual water users consented to this limitation once again. See page 6, *infra*.

The comprehensive report of the Fact Finders appointed to study the reclamation program in 1924, which report became the basis for congressional reform of the reclamation program in 1926 (see *United States* v. *Tulare Lake Canal Co.*, *supra*, 535 F.2d at 1131-1135), likewise took the view that water rights on projects "should never be established except upon the basis of a definite quantity of water." S. Doc. No. 92, 68th Cong., 1st Sess. 78 (1924). It also was well established under state law at the beginning of the century, when the federal reclamation program was getting underway, that an appropriation of water was limited to the amount set forth in the original claim, in order to protect subsequent appropriators. 1 S. Wiel, *supra*, at 496. Similarly, limitations in contracts between a water user and a private water company were binding upon the water user. 3 C. Kinney, *A Treatise on the Law of Irrigation* 272 (?d ed. 1912). The Secretary's implementation of the Reclamation Act therefore was consistent with irrigation practices generally.

The 3.0 acre feet limitations in the contracts on the Newlands Project also are consistent with actual deliveries to project lands in the early years of the project. Following an initial period of greater delivery in the years 1909-1911, deliveries for the years 1912-1922 averaged approximately 2.93 acre feet per acre annually. S. Doc. No. 92, *supra*, at 216. A temporary restraining order in effect in the *Alpine* case between 1950 and 1980 provided for a similar water duty for project land.

Notwithstanding the contemporaneous implementation of the Reclamation Act by the Secretary through contracts providing for a project water right, the Ninth Circuit recently held, in affirming the district court's judgment in the Carson River general stream adjudication, that the 3.0 acre feet per acre limitation in the contracts covering

On December 18, 1926, the United States entered into a contract with petitioner Truckee-Carson Irrigation District ("TCID") (Exh. 492; 5 Tr. 376, 379), under which the TCID assumed responsibility for the operation of the Newlands Project works (Article 6) and the period for repayment of the portion of construction costs of the project allocated to project water users was extended (Article 8). Article 7 of that contract requires TCID to operate the project in full compliance with the reclamation laws and any amendments thereto, the individual contracts with project water users entered into by the United States, "the rules and regulations of the Secretary [then] in force or [t]hereafter promulgated," and court orders and decrees. Article 7 also obligates TCID to "use all proper methods and precautions to secure the economical and beneficial use of irrigation water * * *."[5] Under Article 12 of the contract, individual landowners on the project who accepted the benefits of the contract were deemed to have consented to its terms.

c. *Irrigation of Lands on the Pyramid Lake Reservation*

Some irrigation was undertaken on the Pyramid Lake Reservation in the late 1800's by means of ditches con-

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42,000 acres of land on the Newlands Project were not binding on the water users. The court instead affirmed a decree establishing a water duty on project lands of either 3.5 or 4.5 acre feet per acre. *United States* v. *Alpine Land & Reservoir Co.*, *supra*, slip op. 7.

[5] As recited in Article 1, the contract was entered into pursuant to, *inter alia*, the Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 636. Section 23 of that Act (44 Stat. 641-642) excused water users on the Newlands Project from payment of certain costs of the project, and Section 45 (44 Stat. 648-649) provided for the extension of the period for repayment by project water users of construction costs of reclamation projects if an irrigation district assumed liability for those charges. The 1926 Act was passed in response to the Fact Finders Report, which detailed the various difficulties then confronting the reclamation program. One such problem addressed by the Fact Finders was the wasteful use of water on projects. S. Doc. No. 92, *supra*, at 76-79. The Fact Finders recommended that, "if necessary, compulsory steps should be taken to prevent the excessive use of water in irrigation, as a means of making the water user protect himself against his own wasteful practices." *Id.* at 78. The provision in the TCID contract to ensure the economical and beneficial use of irrigation water no doubt implemented this recommendation.

structed by the United States to divert water from the Truckee River. By 1890, approximately 1,000 acres of Reservation lands were under irrigation by Indians of the Reservation (Pet. App. 7a, 199a). In Section 26 of the Act of Apr. 21, 1904, ch. 1402, 33 Stat. 225, Congress provided for the inclusion of irrigable lands on the Pyramid Lake Reservation within the Newlands Project. Under that provision, the Secretary was authorized, after allotting five acres of such land to each Indian belonging to the Reservation, to reclaim and dispose of the remainder of the irrigable Reservation land to settlers under the Reclamation Act. The 1904 Act was never implemented: no allottments were made, no surplus lands were disposed of to settlers, and no Indian lands received irrigation water from the Newlands Project. Allotments of Indian lands of course now are barred by Section 1 of the Indian Reorganization Act of 1934, 25 U.S.C. 461.

2. The *Orr Ditch* Case

On March 13, 1913, the United States filed an equitable in personam action in the United States District Court for the District of Nevada to quiet title in the United States to the right to use waters of the Truckee River for the Newlands Project and for the use and benefit of the Indians on the Pyramid Lake Reservation. *United States* v. *Orr Water Ditch Co.*, Equity No. A-3 (D. Nev., final decree entered, Sept. 8, 1944) (*"Orr Ditch"*). An amended complaint was filed on July 25, 1914 (Pet. App. 184a-185a), describing the irrigation that had been and would be undertaken on publicly and privately owned land and on the Reservation using the water to which the United States sought to quiet its title (*id.* at 2a-3a, 6a-8a). The United States named as defendants all persons who claimed a right to use Truckee River water in Nevada (*id.* 8a-9a). Neither the Tribe nor the Newlands Project landowners were named as parties.

The amended complaint broadly described the purpose of the Reservation to protect the Indians "in their homes, fields, pastures, fishing, and their use of said lands and waters," and to afford them "an opportunity to acquire the art of husbandry and other arts of civilization" (Pet. App.

6a). The complaint did not, however, mention the maintenance of the fishery as one of the uses of the water to which the United States sought to quiet title,[6] and as both courts below found, there is "no evidence in this case that a *Winters*[7] implied and reserved water right for fishery purposes was actually ever litigated in the course of the *Orr Ditch* proceedings" (Pet. App. 189a, 245a; see also *id.* at 207a, quoting J.A. 399).

a. *The Order Binding The Defendants Inter Se*

After the complaint in *Orr Ditch* was filed, the United States sought to ensure that the decree would be binding not only as between the United States as plaintiff and the water users it named as defendants, but also as among the defendants inter se (J.A. 287-293). The court recognized, however, that under accepted principles of equity practice and res judicata, a judgment would not bind co-parties inter se unless their pleadings advanced their respective claims as being adverse to one another (*id.* at 302-309).[8]

The various defendants in *Orr Ditch*, in response to the United States' petition to quiet title, had filed counter-

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[6] The district court's statements (Pet. App. 185a, 188a) that Paragraph 16 of the complaint alleged that one of the purposes of the United States in filing the *Orr Ditch* suit was to protect the Indians in their fishing are simply wrong. The reference to fishing in the complaint was part of the description of the purposes of the Reservation, not for the bringing of the *Orr Ditch* case. The court of appeals recognized this error, observing that "[t]he government did not assert a claim for water to sustain the Pyramid Lake fishery" (Pet. App. 198a). Nevada states (Nev. Pet. Br. 49 n.63), citing Pet. App. 211a, that the court of appeals "apparently agreed" with the district court that the *Orr Ditch* complaint sought a water right for fishery purposes. Nevada is mistaken. That page of the court of appeals' opinion describes the government's complaint in this case, not *Orr Ditch*.

[7] See *Winters* v. *United States*, 207 U.S. 564 (1908).

[8] The court cited and quoted (J.A. 302-306), *inter alia*, *Nevada Ditch Co.* v. *Bennett*, 30 Or. 59, 82-83, 45 P. 472, 477-478 (1896); 1 C. Beach, Jr., *Modern Pleading and Practice in Equity* § 430, at 449-450 (1900); 2 H. Black, *A Treatise on the Law of Judgments* § 614, at 936 (2d ed. 1902) (the citation in the district court's opinion is to a different page, and so might have been to the first edition); *Corcoran* v. *Chesapeake & Ohio Canal Co.*, 94 U.S. 741, 744-745 (1876).

claims advancing their own claims to Truckee River water (J.A. 290, 292). To avoid the expense and burden of serving each defendant's pleadings on all other defendants, the court entered an order on September 17, 1918, providing that any affirmative pleadings, however designated, that were filed by the defendants for the purpose of presenting their own claims would be deemed to be directed against every other defendant when adverse thereto, as well as against the United States. The court then ordered that the rights of the defendants inter se would be determined and a decree entered having the same effect as though all usual pleadings had been filed and served on all parties (*id.* at 309, 311-312). In contrast to the measures taken to bind the defendants inter se, the court's opinion and order made no mention of binding the Tribe and the Newlands Project water users inter se with respect to their relative interests in the water decreed in the name of the United States as plaintiff.

b. *The Decline of the Fishery*

Evidence was presented to a special master between 1919 and 1921 (Pet. App. 204a). After the special master issued his report in 1925 (J.A. 396-409), the district court entered a temporary restraining order on February 13, 1926, to govern the parties' rights to the use of Truckee River waters until the entry of a final decree (Pet. App. 12a-16a, 188a-186a, 204a).[9]

During this period and until the entry of the final decree in 1944, concern was expressed within the government and by the Indians and others about the decline of the fisheries as a result of the upstream diversions (Pet. App. 204a-208a). In 1922, Lorenzo Creel, a Special Supervisor in the Indian Service at Reno, wrote to the Commissioner of Indian Affairs informing him of the need for water in the

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[9] The temporary restraining order was entered before the United States entered into the contract with TCID on December 13, 1926, for operation of the Newlands Project. See page 6, *supra*. Article 35 of that contract authorizes TCID to divert for use on Newlands Project lands a portion of the water actually available from "[t]he quantity of water decreed to the United States" by the district court in *Orr Ditch*.

lower reaches of the Truckee to allow fish to pass from Pyramid Lake to spawn. He had studied the Reservation's origins, including the 1859 Order (J.A. 326-328), and he informed the Commissioner that the purpose of the Reservation was to permit the Paiute Indians to benefit from the fish in the Lake; it appeared, however, that the Reclamation Service's plans for the Newlands Project did not contemplate allowing sufficient water to flow into Pyramid Lake to maintain the fishery.[10] Mr. Creel also informed the Commissioner that one of the government attorneys in *Orr Ditch* had told him that no claim was being advanced for water to pass into the Lake to maintain its current level or to preserve the fish (J.A. 322-324). He inquired whether the Indians did not have a prior right to sufficient water to permit the fish to reach their spawning grounds, and recommended that the attorneys for the government "who are defending the right of the Indians to water for irrigation purposes, may so amend their brief on behalf of the Indians that this additional water right may be claimed for them, and thus save a separate action, with more prompt results" (J.A. 323; Pet. App. 205a). See also J.A. 333-334, 337.[11]

The Acting Commissioner responded by stating that the Office of Indian Affairs was "disposed to do everything it can to protect the fish, not only for the benefit of the Indians, but of the white population as well, *so far as consistent with the larger interests involved in the proposition having to do with the reclamation of thousands of acres of*

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[10] In a contemporaneous letter of January 28, 1922 to the Supervisor in charge of the Indian Agency in Reno, Mr. Creel stated with regard to establishment of the Reservation (J.A. 328):

> Neither the reservation officials nor the Indian Department had any vision of almost the whole volume of the Truckee River being diverted from its natural channel and carried in a vast canal away over into the valley of another stream and there spread out over thousands of acres of desert lands cultivated by white farmers.

[11] An official of the Nevada Fish and Game Commission wrote Mr. Creel at the same time recommending that a certain amount of Truckee River water should be reserved for the Pyramid Lake Agency to protect the fish rather than being diverted at Derby Dam (J.A. 319-320; see also *id.* at 390).

arid and now useless land for the benefit of the country as a whole" (J.A. 341 (emphasis added); Pet. App. 206a). See also J.A. 343. The Acting Commissioner also stated that Mr. Creel's suggestion that the Indians might have a prior right to sufficient water to enable the fish to ascend the river to their spawning beds "will be investigated with the view of taking such action, if any, as the law and facts may justify" (*id.* at 339). There is no indication, however, that consideration was given to the legal arguments in support of the assertion of such a right in *Orr Ditch*. Indeed, the attorney for the government responded to a congressional inquiry in 1925 by stating that nothing appeared in the pleadings "nor was any testimony taken or any suggestions made from the beginning of the case down to the present time regarding fish" (J.A. 394; Pet. App. 207a). He continued (*ibid.*):

> Inasmuch as the Government has control of the Derby Dam, I have always thought that the Reclamation Service and the Indian Service, both bureaus of the Department of the Interior, could settle the matter between them as to providing the proper fishways and the comparatively small amount of water which may be needed to enable the fish to pass up the fishways.[12]

See also J.A. 349-351, 354-355, 357, 360, 385-388, 424-425, 429, 433-435, 443, 444, 450-457, 459, 472, 475.

c. *The Final Decree in Orr Ditch*

A final decree was entered in *Orr Ditch* on September 8, 1944 (Pet. App. 17a-151a). The decree itemized the rights

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[12] The same attorney had taken a similar view with respect to ensuring that sufficient water would pass Derby Dam to serve the Indian irrigation ditch and a number of non-Indian ditches below the Dam. He informed the Attorney General, when that issue arose because the Indians' prior rights were not being satisfied, that "[i]n effect this controversy is one between the Indian Service and Reclamation Service—both under the control of the Secretary of the Interior," and that the matter "ought to be settled by the Interior Department as between its two bureaus" (J.A. 347; Pet. App. 244a n.21; see also J.A. 357, 360, 429). TCID, however, opposed even the allowance of flows into Pyramid Lake for two weeks for a spawning run in 1926 (J.A. 439).

of the numerous defendants sued by the United States (*id.* at 61a-141a). Rights to the use of water on the Reservation and in connection with the Newlands Project were decreed in the name of the United States as plaintiff, not in the name of the Tribe and TCID or the project water users (Pet. App. 56a-59a).

For the Reservation, *Orr Ditch* decreed a reserved water right, with a priority date of December 8, 1859, for the irrigation of 3,130 acres of bottom lands and 2,745 acres of bench lands with up to 4.0 or 4.1 acre feet per acre of water annually. As explained by the court of appeals (Pet. App. 209a) and the Tribe (Tribe Resp. Br. 22 n.13), the 2,745 acres of bench lands were considerably fewer than the 19,000 acres of irrigable bench lands on the Reservation for which Ethelbert Ward, the attorney for the government, had asserted that a reserved water right should be sought. Compare *Arizona* v. *California*, 373 U.S. 546, 600-601 (1963).

With respect to the reclamation project, the decree recognized a right in the United States to divert 1500 cubic feet of Truckee River water per second, with a priority date of 1902 (Pet. App. 59a):

> for the irrigation of 232,800 acres of land on the Newlands Project, [13] for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such control, disposal and regulation as the plaintiff [United States] may make or desire, provided that the amount of this water allowed for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.

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[13] Most of the 232,800 acres referred to in the decree have never been irrigated by project water. Only 73,002 of these acres have rights to receive project water (TCID Pet. Br. 6), and TCID's manager testified that of these 73,002 acres, no more than approximately 65,000 were actually irrigated by project water between 1967 and 1975 (37 Tr. 7247-7256; Pet. App. 204a n.1).

The decree did not establish how much of this water decreed to the United States would actually be delivered by the United States to individual Newlands Project water users. However, as explained above (see pages 4-6, *supra*), the United States had in turn provided for the delivery of water by entering into individual water right contracts and then, in 1926, by entering into the contract with TCID under which TCID was to operate the project.

The decree provided that persons whose rights were adjudicated would be entitled to change the point of diversion and the place, manner or purpose of use of the waters to which they were entitled, so far as they could do so without injury to the rights of other persons whose rights were fixed by the decree (Pet. App. 149a). The decree also enjoined the parties, their successors in interest, and parties claiming through them from asserting any rights to the water of the Truckee River except those allowed by the decree (*id.* at 145a). Finally, the court approved, adopted, and made part of its decree the Truckee River Agreement entered into in 1935 by the United States, TCID, Washoe County Water Conservation District, the Sierra Pacific Power Company,[14] and some individual water users. That agreement provided, *inter alia*, for the regulation of upstream storage and flows of the Truckee in order to conserve the waters of Lake Tahoe and the River and to raise and stabilize the elevation of Lake Tahoe (Pet. App. 143a-144a; 81-2276 Pet. App. A-111 to A-112).[15]

The Tribe was not a signatory to the Truckee River Agreement, and there is no evidence that a fishery water right was considered by government officials or others in the negotiations leading to the signing of the Agreement

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[14] The Washoe County Water Conservation District is an irrigation district representing a number of upstream diverters in the vicinity of Reno and Sparks, and Sierra Pacific Power operates a number of hydroelectric plants on the Truckee and furnishes water to Reno and Sparks (81-2276 Pet. App. A-111, A-114 to A-115).

[15] The Truckee River Agreement is reproduced at 81-2276 Pet. App. A-110 to A-176. The parties to the Agreement also stipulated to the entry of the final decree in *Orr Ditch* (Pet. App. 186a-187a, 209a; 81-2276 Pet. App. A-155 to A-160, A-177 to A-179).

(Pet. App. 179a; J.A. 472). There is, moreover, no evidence that the Tribe was notified that it had a right to particiate in the *Orr Ditch* proceedings or that it was asked to or did approve the final decree (24 Tr. 4483; 25 Tr. 4704-4705, 4710-4711; 42 Tr. 8553-8554; 43 Tr. 8792, all reproduced in 82-38 Cross-Pet. App. 1a-3a).

3. Developments Subsequent to *Orr Ditch*

The decline of the fishery continued to cause concern after entry of the *Orr Ditch* decree in 1944 (Pet. App. 190a-191a, 208a-210a, 246a, 256a-257a). In Section 4 of the Washoe Reclamation Project Act of 1956, ch. 809, 70 Stat. 777, Congress directed that facilities be provided "to permit increased minimum water releases from Lake Tahoe and restoration of the Pyramid Lake fishery." The House Report stressed that restoration of the fishery "to its full potential value is deemed to be of national interest and importance," and expressed the hope that this could be accomplished "through establishment of a fish hatchery, increase of flows in the Truckee River and channel improvements at the mouth of the river" (H.R. Rep. No. 2055, 84th Cong., 2d Sess. 5 (1956)). See also S. Rep. No. 1829, 84th Cong., 2d Sess. 6 (1956); 102 Cong. Rec. 12754 (1956) (remarks of Rep. Engle).

In 1967, the Secretary of the Interior invoked his authority under Section 10 of the Reclamation Act of 1902, 43 U.S.C. 373, as preserved in Articles 7 and 34 of the 1926 contract with TCID (see page 6, *supra*), to adopt regulations for the operation of the Newlands Project. 32 Fed. Reg. 3098 (1967). Those regulations, which remain in effect, expressly affirm the trust obligation of the United States to protect the rights of the Indians in the waters of the Truckee River and Pyramid Lake. 43 C.F.R. 418.1(b). The regulations direct that criteria be established for the coordinated operation and control of the Truckee and Carson Rivers to ensure compliance with the *Orr Ditch* and *Alpine* decrees on the two rivers, respectively, and to maximize the use of Carson River water to meet requirements on the Newlands Project and thereby to conserve Truckee River water to flow into Pyramid Lake. 43 C.F.R. 418.3(a).

In 1972, after the Secretary adopted operating criteria for 1973, the Tribe sued the Secretary in the United States District Court for the District of Columbia, contending that the proposed criteria furnished more water to the Newlands Project than was provided for in *Orr Ditch* and *Alpine*, permitted wasteful practices, and failed to fulfill the Secretary's trust obligation to maximize flows into Pyramid Lake. The district court agreed and ordered the Secretary to amend the criteria to maximize flows into Pyramid Lake. *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252, 262-266 (D.D.C. 1973). In so holding, the court observed that provisions for enforcement of the criteria would be necessary because TCID, which had control of the project works under the 1926 contract, had formally announced that it would "disregard" even the criteria adopted by the Secretary and would "divert water as it chooses by giving instructions to its own water masters" (*id.* at 258).

The Secretary acquiesced in the district court's decision in *Pyramid Lake Paiute Tribe v. Morton* and published the new operating criteria ordered by the district court. 38 Fed. Reg. 6697 (1973). After TCID announced that it would not adhere to these new criteria, the Secretary, pursuant to Article 32 of the 1926 contract with TCID, notified TCID on September 14, 1973 of his intent to cancel that contract (J.A. 58-59). Before the termination could take effect, TCID sued the Secretary in the United States District Court for the District of Nevada to prevent the termination. This suit was tried in 1979, but has not yet been decided. *Truckee-Carson Irrigation District* v. *Secretary of the Interior*, Civil No. R-74-34 BRT (D. Nev.).

In September 1972, the United States applied for leave of this Court to file a complaint seeking, *inter alia*, declaration and quantification of a reserved right to Truckee River water for fisheries on the lower Truckee and in Pyramid Lake. This Court declined to exercise its original but nonexclusive jurisdiction under 28 U.S.C. 1251(b)(2); *United States* v. *Nevada*, 412 U.S. 534 (1973).[16]

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[16] In 1975, the Tribe and the government settled a claim brought by the Tribe in 1951, pursuant to the Indian Claims Commission Act of

4. Proceedings in this Case

a. *The District Court's Decision*

After this Court declined to exercise its original jurisdiction, the United States filed the instant action in the United States District Court for the District of Nevada to quiet title to a reserved right to Truckee River waters, with a priority date of 1859, for maintenance of the fishery in the lower reaches of the River and in Pyramid Lake (Pet. App. 152a-154a, 159a). Joined as defendants were petitioners State of Nevada and TCID and approximately 17,000 persons having rights to the use of Truckee River waters (*id.* at 161a). Pursuant to Fed. R. Civ. P. 23, the district court certified a class of the 3,800 of these defendants who hold water right certificates for the use of water on the Newlands Project and designated TCID and seven individual water users as representatives of that class (J.A. 193-204, 206).

On December 8, 1977, after a trial on the defenses of res judicata and collateral estoppel, the district court dismissed the Tribe's complaint in intervention as well as the government's complaint to the extent it sought a reserved right for the tribal fishery (Pet. App. 195a-196a). The court held that because no reserved water right for the fishery was "actually ever litigated" in *Orr Ditch* (Pet. App. 189a), the fishery claims were not barred by collateral estoppel (*id.* at 192a). The court concluded, however, that the doctrine of res judicata did bar these claims (*ibid.*).

The court explained that it placed "primary reliance" on the passage of the Reclamation Act of 1902 (Pet. App.. 161a). The district court found that the government's "pri-

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1946, 25 U.S.C. (& Supp. V) 70 *et seq.*, for damages to the Pyramid Lake fishery as the result of not receiving "all the water to which [the Tribe] * * * was entitled under rights reserved for it" when the Reservation was established (J.A. 491, reported as *Pyramid Lake Paiute Tribe* v. *United States*, 36 Ind. Cl. Comm'n 256, 259 (1975)). The parties stipulated to their understanding that a fishery right had not been extinguished and that the $8 million settlement accordingly did not represent "damages or compensation for the loss, dimunition or taking" of water rights (J.A. 492). See Pet. App. 210a. Compare *Menominee Tribe* v. *United States*, 391 U.S. 404, 407 (1968).

mary purpose" in instituting *Orr Ditch* was to secure water rights for the Newlands Project (Pet. App. 164a), but that once the suit was filed, the Department of the Interior was "squarely presented * * * with the problem of having to deal with a limited quantity of water out of which to satisfy two claims—the project rights and the Indians' rights" (*id.* at 165a). "Faced with this apparent and forseeable conflict of purposes," the district court explained (*id.* at 165a), the Secretary chose to favor reclamation interests over Indian interests (*id.* at 165a-168a).

In the district court's view, the Reclamation Act and the Act of Apr. 21, 1904, authorizing the inclusion of Pyramid Lake Reservation lands within the Newlands Project permitted the Secretary of the Interior to acquire and extinguish, without compensation, any land or water rights that might have been reserved for the benefit of the Tribe, in order to accomplish reclamation goals. The court's premise was that "Indian lands, if necessary to be acquired to carry out the purposes of the Reclamation Act, were secondary when conflicting with the purposes of the Reclamation Act" (Pet. App. 167a; see also *id.* at 179a). The district court's formal findings of fact reiterate the basis of its holding, stating (*id.* at 189a) that the conflict of purposes with respect to the Reservation and Newlands Project—

> was apparent prior to and during the *Orr Ditch* proceedings and was resolved within the executive department of government by top-level executive officers acting within the scope of their Congressionally-delegated duties and authority and were political and policy decisions of those officials charged with that responsibility, which decisions resulted in the extinguishment of the alleged fishery purposes water right.

The district court concluded that the government lawyers who carried out the top level administrative resolution of the conflicting purposes that the court believed had resulted in an extinguishment of the fishery right were not chargeable with a conflict of interest and that there was for this reason no violation of the Tribe's due process rights (Pet. App. 190a). The court further held that even if the lawyers had such an impermissible conflict, it was internal

to the government and unknown to the defendants in *Orr Ditch* (Pet. App. 191a). Against this background, the district court held that the assertion of the fishery water right was barred by res judicata because it was part of the "same quiet title cause of action" asserted on behalf of the Tribe for irrigation purposes in *Orr Ditch* (Pet. App. 188a), and because the United States, and the Tribe in privity with it (*ibid.*), each had a "full and fair" opportunity in *Orr Ditch* to present and litigate the fishery claim (Pet. App. 186a, 188a).

b. *The Court of Appeals' Decision*

i. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings (Pet. App. 197a-253a). The court rejected the principal basis of the district court's holding: that the Reclamation Act of 1902 authorized the Secretary to extinguish the Indian water rights in pursuance of reclamation interests and that the Secretary therefore had lawfully extinguished the reserved water right for the fishery by choosing not to advance it in *Orr Ditch* (Pet. App. 214a-219a).

The court of appeals did not disturb the district court's factual finding that the Secretary had subordinated the Reservation interests to the interests of the reclamation project. The court held, however, that the Secretary did not have the legal authority to do so. Relying on this Court's intervening decision in *California* v. *United States*, 438 U.S. 645 (1978), the court explained that Section 8 of the Reclamation Act, 43 U.S.C. 372, authorizes the Secretary to acquire water rights only pursuant to state law; because federal reserved rights cannot be acquired or extinguished under state law, the court reasoned, the federally reserved rights appurtenant to the Pyramid Lake Reservation could not be extinguished administratively by the Secretary in the manner determined by the district court.

The court found this conclusion reinforced by the nature of a reserved water right, which is based on an implied congressional intent to reserve enough water to fulfill the purposes of the reservation. The court could not "suppose that reservations made for non-reclamation purposes were im-

pliedly supplanted by the reclamation program," and held that it would not infer such a result "absent the clearest legislative directive" (Pet. App. 217a). This principle "applies *a fortiori* when Indian water rights are involved," the court explained, because "[a]n intent to extinguish Indian property rights is 'not to be lightly imputed to Congress'" (*ibid.*, quoting *Menominee Tribe* v. *United States*, 391 U.S. 404, 413 (1968)). The court found that it would be especially inappropriate to read the Reclamation Act as conferring extinguishment authority in the "backhanded" manner suggested by the district court, without any notice or compensation to the Tribe (Pet. App. 218a-219a, quoting 391 U.S. at 412).

ii. The court of appeals also agreed with the district court that there was no evidence that a "'reserved water right for fishery purposes was actually ever litigated in the course of the *Orr Ditch* proceedings'" (Pet. App. 245a; citation omitted). The court had no occasion actually to review the district court's holding that collateral estoppel therefore did not bar assertion of the fishery right, because petitioners did not make a collateral estoppel argument in the court of appeals.

The court of appeals did hold, however, that under the distinct doctrine of res judicata, the *Orr Ditch* decree barred the United States and the Tribe from seeking a water right for the Reservation's fishery as against any defendant sued by the United States in *Orr Ditch* (Pet. App. 224a-239a).[17] The court rejected the contention that the Tribe could not, under the Due Process Clause, be barred by the prior decree because the government's representation of it was improper and inadequate as a result of conflicts of interest (Pet. App. 226a-238a). The court agreed that the Tribe's interest in the resources of its Executive Order Reservation is a property interest protected by the Due Process Clause and that a Tribe is not necessarily bound in a case brought by the United States if the government openly advances conflicting interests (Pet. App. 231a-237a). The court also assumed, without deciding, that

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[17] The court also found the fishery claim barred as against subsequent appropriators of Truckee River waters who were not parties to *Orr Ditch* but who relied on that decree (Pet. App. 239a-240a).

the United States' representation of the Tribe's interests in *Orr Ditch* was "improper and inadequate" (Pet. App. 237a-238a). The court nevertheless found that res judicata barred the action as against all defendants in *Orr Ditch* because of the district court's finding that any such impropriety was unknown to those defendants (Pet. App. 238a).

However, the court held that the decree in *Orr Ditch* adjudicating rights between the United States and the defendants did not prevent adjustment, as between the Pyramid Lake Reservation and the Newlands Project, of the water rights decreed in the name of the United States as plaintiff in *Orr Ditch*. The court explained that the government had not filed any pleadings in *Orr Ditch* stating that the rights to be decreed to the United States "would bind the Reservation and the Project *inter se*" (Pet. App. 243a). "As a general matter," the court reasoned, "a judgment does not conclude parties who were not adversaries under the pleadings" except "as to issues actually or necessarily litigated" (*id.* at 240a-241a). Because in this case there was no "adversity under the pleadings between these two interests" advanced by the United States and because, as the district court found, no fishery claim was actually litigated in *Orr Ditch*, the court held that res judicata did not bar assertion of a reserved water right for the benefit of the Tribe as against the water right decreed in the name of the United States for use in connection with the reclamation project (Pet. App. 245a).

The court observed that it "might be persuaded to relax the adversity requirement" as between persons who actually were co-parties, in order "to fit the realities of water adjudications" (Pet. App. 241a). However, in *Orr Ditch*, the Tribe and TCID were not parties. In the court's view this circumstance made the requirement that "adversity be established by pleadings * * * particularly compelling" (Pet. App. 243a), because "[b]y representing the Tribe and the Project against the *Orr Ditch* defendants, the government compromised its duty of undivided loyalty to the Tribe" (Pet. App. 242a, citing *Restatement (Second) of Trusts* § 170, & comments p, q and r (1959)). The court stressed that "[r]ules of res judicata have evolved safeguards to en-

sure the integrity of representative functions," and that it "would undermine those safeguards were [it] lightly to assume that the government intentionally represented conflicting interests" (Pet. App. 242a).

The court of appeals therefore remanded for further proceedings, as between the respective water rights previously decreed to the United States in *Orr Ditch*, on matters relating to the existence and extent of any reserved water right to maintain the Pyramid Lake fishery (Pet. App. 248a-249a). Judge Schroeder dissented, expressing the view that res judicata is a complete bar to the cause of action to quiet title to a reserved water right for fishery purposes (*id.* at 249a-253a).

SUMMARY OF ARGUMENT

A. Under the doctrine of res judicata, a final judgment bars further claims by a party to an action or by persons in privity with that party against another party or any person in privity with that other party. The court of appeals applied that principle here to bar this quiet title action by the United States or the Tribe against any other party in *Orr Ditch* or their successors in interest. The court of appeals has simply permitted a reallocation of the water decreed in *Orr Ditch* to a single party—the United States—from reclamation uses to a Reservation use with an earlier priority. The doctrine of res judicata does not bar a single party from reallocating its water in this fashion, and the decree in *Orr Ditch* expressly preserves the parties' rights to do so.

By bringing this suit, the United States has waived any res judicata defense it might have under *Orr Ditch* to resist an allocation to Reservation uses of a greater portion of the water decreed to the United States, and a court should not frustrate a trustee's ability to fulfill its trust obligations in this manner. Moreover, the rights of individual landowners to receive water from the aggregate amount awarded to the United States for the Newlands Project were not at issue in *Orr Ditch*, and the decree therefore does not bar the satisfaction of another federal water right with an earlier priority date from that pool. This conclusion is supported by the long-established principle, recognized by the district court

in *Orr Ditch* itself, that res judicata does not apply even among co-parties unless there is adverseness between them under the pleadings. Here, the claims of *non*-parties—the Tribe and project water users—were not identified in *Orr Ditch* as being adverse to one another and therefore to be conclusively resolved.

B. In the particular circumstances of this case, the decree in *Orr Ditch* cannot be given absolute preclusive effect for the additional reason that neither the court nor the United States took any measures to provide an opportunity for the Tribe to be separately heard. Such protection was necessary because the interest of the United States in securing water for the Newlands Project directly and substantially conflicted with its trust obligation to secure a supply of water to fulfill the fishery purpose of the Reservation. It therefore is appropriate to permit the quiet title action to proceed as against the very property that was awarded to the United States for the conflicting reclamation use.

C. The legal principles governing this case as well as practical and equitable considerations support confining the scope of further proceedings to an allocation between Reservation and Newlands Project uses of the water decreed to the United States itself in *Orr Ditch*.

ARGUMENT

A CAUSE OF ACTION TO QUIET TITLE IN THE UNITED STATES TO A RESERVED RIGHT TO TRUCKEE RIVER WATERS TO MAINTAIN A FISHERY FOR THE BENEFIT OF THE TRIBE IS NOT ABSOLUTELY BARRED, UNDER THE DOCTRINE OF RES JUDICATA, BY THE FINAL DECREE IN *UNITED STATES* v. *ORR WATER DITCH CO.*

The narrow question presented at this interlocutory stage of the case is whether the United States and the Tribe are absolutely barred by the doctrine of res judicata even from asserting a claim to a reserved water right to preserve and protect the historic fisheries in the lower reaches of the Truckee River and Pyramid Lake for the benefit of the Tribe. We submit that the straightforward

application of settled principles of res judicata and fiduciary obligations compels the conclusion that the case properly may proceed to the merits to the limited extent of permitting a prior reserved water right for the fisheries to be satisfied out of the water made available to the United States itself under *Orr Ditch* for reclamation purposes, which have a later priority date. The court of appeals so held, and its judgment accordingly should be affirmed.

A. THE DECREE IN *ORR DITCH* DOES NOT BAR ASSERTION OF THE RESERVED WATER RIGHT CLAIM AS AGAINST THE RIGHT DECREED TO THE UNITED STATES ITSELF IN *ORR DITCH* FOR THE USE OF WATER IN CONNECTION WITH THE NEWLANDS PROJECT

1. Under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana* v. *United States*, 440 U.S. 147, 153 (1979).[18] The court of appeals fully respected and applied that principle in this case[19] It held

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[18] See also *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979); *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 578-579 (1974); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 319-320 (1927); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1876). *Restatement (Second) of Judgments* §§ 17, 18, 34, 39-41, 43 (1982); *Restatement of Judgments* §§ 45, 46, 79, 83 (1942); 2 H. Black, *supra*, note 8, § 534.

[19] There is considerable force to the Tribe's argument (Tribe Cross-Pet. Br. 18-37) that the fishery water right is not part of the same quiet title cause of action involved in *Orr Ditch*. The complaint in *Orr Ditch* mentioned only irrigation when discussing the uses to which the water to which the United States sought to quiet title would be put (Pet. App. 2a-9a). Furthermore, as the Tribe explains (Tribe Cross-Pet. Br. 22-25), the evidence necessary to establish and quantify a reserved water right for a fishery would differ considerably from that necessary to establish such a right for irrigation: the latter permits the diversion of water from the River and is calculated on the basis of irrigable acreage and the water demands for the particular soil and crops (*Arizona* v. *California*, *supra*, 373 U.S. at 598-601), while the former

that the instant quiet title suit is barred by res judicata as against *all* of the defendant water users sued by the United States in *Orr Ditch* and their successors in interest (Pet. App. 224a-239a). The court held, in other words, that the United States (the party plaintiff in *Orr Ditch*) and the Tribe (on whose behalf the United States appeared in a "representative" capacity in *Orr Ditch* and with whom the Tribe therefore was in privity) are both barred from asserting further claims to water as against any other party to *Orr Ditch* or against any person in privity with such other party. Accordingly, far from announcing some new principle that threatens the finality of judgments generally or of stream adjudications in particular, the Ninth Circuit invoked and enforced the doctrine of res judicata to give the *Orr Ditch* decree preclusive effect as among all of the parties and their privies.

The court of appeals did permit the cause of action to quiet title to a reserved fishery water right in the United States for the benefit of the Tribe to proceed as against the water right that was decreed to the United States itself in *Orr Ditch* for reclamation purposes. But the effect of the decision is only to permit a reallocation between several uses of the water that is furnished to a single party—the United States—pursuant to the decree in *Orr Ditch*. A judgment awarding property to one party ordinarily is not concerned with the allocation that party makes of his property, because the other parties have no legal interest in that matter if their own rights are not adversely affected.

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would be intended to retain water in the River and maintain the level of the Lake for conservation of the fishery resource (*Cappaert* v. *United States*, 426 U.S. 128, 140-141 (1976)).

It also should not lightly be inferred that all protection for a body of water of such fundamental importance to the Reservation and the region was silently lost and merged into the judgment in *Orr Ditch*. But because we believe that the Lake and its fishery can be fully protected by satisfaction of a prior reserved water right out of the water made available to the United States under *Orr Ditch* for the Newlands Project, we do not challenge here the court of appeals' holding that the final decree in *Orr Ditch* was intended to bar the assertion by one party or his privy of any water right claims against another party or that other party's privy (Pet. App. 225a; see also *id.* at 145a).

The doctrine of res judicata—which establishes a policy of repose with respect to the matters that were concluded "between the parties" (*Restatement (Second) of Judgments* § 17 (1982))[20]—likewise is not concerned with such matters.

The decree in *Orr Ditch* leaves no doubt that this principle applies here. That decree expressly provides that the persons whose rights were adjudicated by the decree "shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree" (Pet. App. 149a). See *Restatement (Second) of Judgments*, *supra*, § 26(1)(b). The decree therefore does not foreclose any of the defendant water users from applying the water right decreed to him to different uses or from transferring it to others, so long as the rights of the other defendants and the United States are not adversely affected. Conversely, the decree does not bar the United States from changing the use of the water it is entitled to divert for reclamation purposes to satisfy a reserved water right for the benefit of the Tribe that has an earlier priority date, so long as the defendants in *Orr Ditch* and their successors in interest are not adversely affected.[21]

It must be stressed that this is not a case in which the United States has invoked the affirmative defense of res judicata in a suit brought by another party in *Orr Ditch* or by the Tribe to require that the water decreed to the

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[20] See, *e.g.*, *Federated Department Stores, Inc.* v. *Moitie*, *supra*, 452 U.S. at 398, 401-402; *Brown* v. *Felsen*, *supra*, 442 U.S. 131-132; *Montana* v. *United States*, *supra*, 440 U.S. at 153-154; *Commissioner* v. *Sunnen*, *supra*, 333 U.S. at 597; *Restatement of Judgments* §§ 47, 48 (1942).

[21] Because the decree in *Orr Ditch* expressly preserves the right of a party to change the uses to which its water is put, any judicial proceedings necessary to accomplish this end would not be inconsistent with the purpose of res judicata of protecting a party's adversaries and the courts from the expense and vexation attending repetitive lawsuits concerning a matter that previously was decided. See, *e.g.*, *Montana* v. *United States*, *supra*, 440 U.S. at 153-154.

United States for reclamation purposes be devoted to some other use. By bringing the instant action to quiet title to a prior reserved water right in fulfillment of its continuing trust obligation to preserve the Reservation for the benefit of the Tribe, the United States obviously has waived whatever res judicata defense it otherwise would have to such a reallocation.

A court should not lightly frustrate the ability of a trustee to protect the interests of its beneficiary in this manner. Indeed, it is a long recognized principle of res judicata that the judgment in a case in which a party appeared in his individual capacity does not bind him in a subsequent action in which he appears in a representative capacity on behalf of another. This rule is designed to prevent against conflicts of interest arising out of the two capacities in which a party might appear and thereby to safeguard the integrity of the representative function. *Restatement (Second) of Judgments*, *supra*, § 36(1) & comment a, illustration 2, & reporter's note, at 366; 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 0.411[3] and [4] (2d ed. 1982); *Restatement of Judgments*, *supra*, § 80(1); 2 H. Black, *supra*, § 536.

If this rule applies in the case of an ordinary trustee, a fortiori, it must apply in a case that involves the national policy of preserving property held in trust for the benefit of the Indians and protecting against dispositions or invasions of that property that Congress has not authorized. See *e.g.*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369-370 (1968); *Cramer* v. *United States*, 261 U.S. 219, 232-234 (1923); *Heckman* v. *United States*, 224 U.S. 413, 437-440 (1912). See also *United States* v. *California*, 332 U.S. 19, 39-40 (1947). Accordingly, the judgment in *Orr Ditch* with respect to the portion of Truckee River water the United States sought and obtained for its own use and disposition in connection with the Newlands Project (see pages 27-28, *infra*) does not bar the United States from now advancing a prior claim to that same water in its representative capacity on behalf of the Tribe. It would, moreover, be especially inappropriate for the Court to fashion an exception to that established rule of res judicata in the circumstances of this

case, which concerns the need for water to preserve species of fish that are classified as endangered and threatened under the Endangered Species Act. See *TVA* v. *Hill*, 437 U.S. 153 (1978); *Carson-Truckee Water Conservancy District* v. *Watt*, *supra*, 549 F. Supp. at 708-710.[22]

2. Petitioners nevertheless argue that the decree in *Orr Ditch* precludes the satisfaction of the prior reserved water right out of the water to which the United States is entitled under that decree because such a reallocation would affect the individual water users on the Newlands Project. The difficulty with this argument is that the judgment in *Orr Ditch* did not address the water rights of individual water users on the Newlands Project.

Neither the project water users nor TCID on their behalf were named as parties or intervened in *Orr Ditch* (compare *United States* v. *Alpine Land & Reservoir Co.*, *supra*; Pet. App. 252a & n.1 (Schroeder, J., dissenting)), and no water right was decreed to the water users in their own names (compare *Bryant* v. *Yellen*, 447 U.S. 352, 365, 369-373 (1980)). Nor did the United States purport to represent the interests of individual project water users in *Orr Ditch*. Significantly, the district court in this case did find that the United States appeared in a "representative capacity" on behalf of the Indians in *Orr Ditch* (Pet. App. 184a; see also *id.* at 188a-189a), and the decree in *Orr Ditch* itself awards Reservation water rights expressly "for the United States and *for the Indians belonging on said reservation and for*

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[22] *United States* v. *California & Oregon Land Co.*, 192 U.S. 355 (1904), cited by petitioners (Nev. Pet. Br. 29; TCID Pet. Br. 19, 29), is inapposite here. There, the United States sought to recover land for the benefit of Indians from a third party, and the suit was held to be barred by the judgment in a prior suit in which the United States had sought but failed to recover the same land from the same party for its own use, on the ground that the patents were void. Here, the United States is not attempting to obtain additional water from the defendants sued in *Orr Ditch*. It is seeking to establish a prior reserved right to the water awarded to the United States in *Orr Ditch*. If the United States had prevailed in the first suit in *California & Oregon Land Co.*, that judgment would not have prevented the United States from establishing the Indians' right to the land. Moreover, in *California & Oregon Land Co.*, unlike here, there was no suggestion of a conflict of interest.

their use and benefit" (id. at 57a-58a; emphasis added). See *Restatement (Second) of Judgments*, *supra*, § 41(1).

In contrast, the district court in this case found that *Orr Ditch* "was specifically instituted by the plaintiff [United States] in order to quiet title in and to the waters of the Truckee River *for the use and benefit of the plaintiff for the Newlands Reclamation Project*" (Pet. App. at 184a; emphasis added). Consistent with the capacity in which the United States sued—*i.e.*, on its own behalf—the water right for the Newlands Project was awarded exclusively in the name of the United States. The decree awarded an aggregate right to the United States to divert a single quantity of Truckee River water—1500 cubic feet per second—for a variety of purposes in connection with the Newlands Project, including irrigation, and set ceilings of 3.5 and 4.5 acre feet per acre when the United States did deliver water for irrigation (Pet. App. 59a, quoted at page 12, *supra*). This water is expressly subject to "such control, disposal and regulation as the plaintiff [the United States] may make or desire" (Pet. App. 59a),[23] and, as noted above, the decree permits a party whose rights were adjudicated to change the uses to which its water is put (*id.* at 149a). The contemporaneous interpretation of the decree also was that it awarded water rights to the United States, not individual water users, based on the United States' ownership of the waters when they were appropriated in 1902 (J.A. 363, 397, 405, 405-407, 416, 446, 485).

To be sure, the United States in turn entered into contracts for the delivery of its project water to individual landowners on the Newlands Project, and such contracts create a vested water right appurtenant to the individual tract of land when the landowner's repayment and other obligations under the contract have been satisfied. See *Ickes v. Fox*, *supra*, 300 U.S. at 94-97. These contracts thus create rights against the United States—and, presumably, against third parties—that are entitled to certain protections. The narrow question presented in this case, how-

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[23] The understanding of the attorney for the government while *Orr Ditch* was pending conforms to this broad language, for he stated that he believed that the needs of the Reservation for the fishery could be accommodated administratively by releasing more water from Derby Dam when the need arose rather than diverting it into the Truckee Canal (Pet. App. 207a, 244a n.21).

ever, is whether those rights are entitled to one particular form of protection: the defense of res judicata. The relevant inquiry for present purposes, then, is not whether individual Newlands Project water users have rights to receive project water, but whether any such rights were adjudicated or at issue in *Orr Ditch* and are therefore entitled to the specific protection of res judicata.[24] It is clear, as we have said, that the answer is no.[25]

3. The conclusion that the fishery claim is not barred also is supported by the established principle, relied upon by the court of appeals, that preclusion does not apply between co-parties to a suit who are not adversaries under the pleadings, except as to issues actually litigated between them.[26] See *Restatement (Second) of Judgments*, *supra*,

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[24] Where water is allowed under the *Orr Ditch* decree for diversions through a private ditch for another party, the decree expressly provides that "the conditions of any contractual relations existing between them are not hereby determined" (Pet. App. 146a). This reinforces the conclusion that the contractual relations between the United States and those to whom it distributes water through its "ditch"—the Truckee Canal—likewise were not "determined" by *Orr Ditch*.

[25] Even if the Court were to find, contrary to our submission, that the United States did appear in a "representative capacity" on behalf of project water users in *Orr Ditch*, as that concept is understood under the law of res judicata, the rule that res judicata does not bar the second suit where a party appears in a different capacity would still support permitting this suit to proceed. That rule applies equally where the party appears in a representative capacity on behalf of different beneficiaries in the successive suits. *Restatement (Second) of Judgments*, *supra*, § 36 comment a; *Restatement of Judgments*, *supra*, § 80, comment b at 364. Here, the United States would have "represented" project water users in *Orr Ditch* with respect to the claim to water for the Newlands Project, while in this case the United States appears in a representative capacity on behalf of the Tribe, asserting a prior right.

[26] Both courts below found that the fishery claim was not actually litigated (Pet. App. 189a, 245a), so this exception does not apply here. These findings also are the complete answer to the argument by Nevada and TCID that collateral estoppel bars the assertion of the fishery claim (Nev. Pet. Br. 36-43; TCID Pet. Br. 34-42), because collateral estoppel applies only to issues that actually were litigated. *Restatement (Second) of Judgments*, *supra*, § 27. We defer to the Tribe for a more detailed answer to the collateral estoppel argument. See Tribe Resp. Br. 7-12. We do note, however, that the evidence bearing on the fishery and irrigation issues differs greatly. See note 19, *supra*. There is, moreover, no basis for Nevada's suggestion (Nev. Pet. Br. 42) that the United States put in issue all of the purposes of the Reser-

§ 38; 1B *Moore's Federal Practice*, *supra*, ¶ 0.411[2]; *Restatement of Judgments*, *supra*, § 82; 2 H. Black, *supra*, § 599; see also note 8, *supra*. This principle was well recognized in quiet title and other equitable actions for the adjudication of water rights at the time *Orr Ditch* was filed. See 3 C. Kinney, *supra*, § 1545, at 2782. Indeed, the district court in *Orr Ditch* itself recognized this principle and, on the motion of the United States, took measures in its 1918 order to ensure that the defendants sued by the United States in that case *would* be formally regarded as adversaries under the pleadings for the specific purpose of ensuring that they would be bound inter se. See pages 8-9, *supra*.

Contrary to petitioners' contention (Nev. Pet. Br. 38; TCID Pet. Br. 34), the requirement that res judicata applies among co-parties only if they are adversaries under the pleadings is not an outmoded technicality. This Court recently has held that the judicially created doctrine of res judicata does not apply where the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim. *Kremer* v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982), slip op. 19-20 & n.22. "The concept of adversarial litigation is that determination of issues is not full and fair unless a party has an opportunity to present proofs and argument specifically directed to the matters in controversy." *Restatement (Second) of Judgments*, *supra*, § 38 comment a at 378. This opportunity exists where parties are aligned on opposite sides of the litigation. It also may exist where claims or defenses in the pleadings place parties in an adversarial relation to each other—*e.g.*, by cross-claim, impleader, or interpleader—even though they also may be aligned

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vation for which water was reserved or that the *Orr Ditch* court's finding of an irrigation purpose was to the exclusion of a purpose to protect the fishery. A finding that no water was reserved for fishery purposes would be flatly inconsistent with the entire history of the Reservation (see pages 2-3, *supra*) and cannot be implied from the record here. Moreover, collateral estoppel applies only where the determination of an issue was essential to the judgment in the prior proceeding. *Restatement (Second) of Judgments*, *supra*, § 27. A determination regarding fishery purposes of the Reservation was not essential to the recognition of a right for irrigation purposes.

against a third party. *Id.* at 378-379. But "[w]here no such pleadings have been interposed, the possibility of merger and bar *by definition* does not arise" (*id.* at 379; emphasis added), just as merger and bar would not arise if the plaintiff had never filed his complaint and there thus was no adverseness under pleadings between the plaintiff and the defendant. Thus, the requirement that adverse interests be identified as such in the pleadings in order to put other parties and the court on notice that a cause of action is to be litigated between them is an important aspect of the adversary process and the judicial resolution of disputes.

Petitioners contend (TCID Pet. Br. 25-26, 31-34; Nev. Pet. Br. 32-35), however, that the requirement of formal adverseness under the pleadings should be relaxed in comprehensive water adjudications because all claims in such a case are inherently adverse to one another and that the court of appeals' decision accordingly will threaten the finality of judgments in such cases. Whatever their merit in other settings, these contentions have no relevance here. The court of appeals in fact applied the doctrine of res judicata to bar assertion of the fishery claim by the United States and the Tribe against *all* other parties in *Orr Ditch*, irrespective of the question of adverseness under the pleadings. Moreover, as it happens, there *was* adverseness under the pleadings among the co-defendants in *Orr Ditch* by virtue of the district court's order in 1918 deeming the defendants' responses to the United States' complaint to be directed to co-defendants as well. For both of these reasons, the question whether the pleadings formally must establish co-parties as being adverse to one another simply is not raised in this case. And, significantly, the court of appeals indicated that it, like petitioners, would be disposed to relax the requirement of formal adverseness on the pleadings as between parties in water adjudications because of the inherently adverse nature of claims in such a proceeding (Pet. App. 241a)[27] Accordingly, nothing in the

[27] Even if this requirement regarding the contents of the pleadings themselves is relaxed, this would not alter the basic requirement that parties in fact be in an adverse posture under their pleadings; the ap-

Ninth Circuit's decision prevents state or federal courts from relaxing formal pleading requirements in comprehensive stream adjudications or any other suits or from continuing to utilize in rem or special statutory water adjudication procedures that dispense with a requirement that parties formally set up their claims as adverse to each other.

The court of appeals did draw on the principle of adverseness under the pleadings in the unique circumstances of this case involving *non*-parties who claim rights to receive water from that awarded to the United States alone. A judgment in favor of a party to a lawsuit ordinarily does not finally determine the competing claims of non-parties who assert a right to share in the award made to that party. At the very least, for the judgment to be given that effect, the persons whose claims are to be resolved must have been given notice that the proceeding would have this effect and be afforded an opportunity to intervene and be heard on their competing claims. See, *e.g.*, *Texaco, Inc.* v. *Short*, 454 U.S. 516, 534 (1982); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In comprehensive water adjudications, for example, even co-parties whose rights will be adjudicated inter se despite the absence of formal pleadings explicitly so stating presumably must be given some form of notice—if only in the complaint, the governing statute, or prior decisions—that the final judgment will have this effect.[28]

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proach petitioners advocate and the court of appeals suggested is merely a procedure by which the pleadings or other water right claims filed by interested parties in a water adjudication are formally *deemed* to be adverse to one another. This is the approach the district court took in *Orr Ditch* with respect to the pleadings actually filed by co-defendants.

[28] Some form of notice of the comprehensive nature of the decree appears to have been given in all of the cases petitioners cite (TCID Pet. Br. 27; Nev. Pet. Br. 34 & nn.41 & 42). See, *e.g.*, *Frost* v. *Alturas Water Co.*, 11 Idaho 294, 296-301, 81 P. 996, 996-997 (1905), cited in *Morgan* v. *Udy*, 58 Idaho 670, 680-681, 79 P.2d 295, 299 (1938); *City of Pasadena* v. *City of Alhambra*, 180 P.2d 699, 714-715 (Cal. Dist. Ct. App. 1947), modified on other grounds, 33 Cal.2d 908, 207 P.2d 17 (1949), cert. denied, 339 U.S. 937 (1950); *Pacific Live Stock Co.* v.

If the district court in *Orr Ditch* perceived that formal adverseness on the pleadings was required even as among the parties themselves, a fortiori some sort of adverseness also was required for the claims of non-parties—the Tribe and project water users—to be regarded as conclusively determined inter se. Yet neither the district court nor the United States took comparable measures in *Orr Ditch* to ensure that these claims would be presented in such a manner that they would be conclusively determined inter se. As the court of appeals observed, "[s]uch notice might have suggested to the Tribe that it must seek to intervene, and to the court that intervention might be proper" (Pet. App. 259a n.20). The United States did not file pleadings or otherwise manifest an intent that the two claims it was asserting were being presented as adverse to one another, such that the judgment would work a binding and permanent judicial allocation between these two uses that even the United States—unlike all other parties awarded rights in *Orr Ditch*—could not alter. Cf. *Williams* v. *Zbarraz*, 448 U.S. 358, 367 (1980); *United States* v. *ICC*, 337 U.S. 426, 430 (1949). Similarly, TCID—which, as TCID itself concedes (TCID Pet. Br. 22-25), was intimately familiar with the proceedings in *Orr Ditch*—did not intervene on behalf of project water users in order to have their individual rights determined as against those of the Tribe. In these circumstances, with no adverseness established on the pleadings or otherwise, there was not a "full and fair opportunity" in *Orr Ditch* to conclusively litigate the claims to water for the Reservation and Newlands Project water users inter se.[29]

Ellison Ranching Co., 52 Nev. 279, 292-295, 286 P. 120, 122 (1930); *In re Chewaucan River*, 89 Or. 659, 171 P. 402, appeal dismissed, 89 Or. 668, 175 P. 421 (1918).

[29] TCID and Nevada contend that adverseness of interests openly emerged in the later phases of *Orr Ditch* after TCID was formed and participated in the negotiations leading up to the Truckee River Agreement (TCID Pet. Br. 22-25; Nev. Pet. Br. 35). Whatever might have been TCID's position regarding the amount of water the United States should claim, however, the relevant point is that it did not intervene in *Orr Ditch* so that its position would be litigated as against the United States or the Tribe. The United States continued to prose-

B. UNDER THE PARTICULAR CIRCUMSTANCES OF THIS CASE, THE DOCTRINE OF RES JUDICATA DOES NOT BAR ASSERTION OF THE FISHERY CLAIM AS AGAINST THE RIGHT DECREED TO THE UNITED STATES BECAUSE OF THE UNITED STATES' CONFLICTING INTERESTS IN *ORR DITCH*

The final decree in *Orr Ditch* does not have an absolute preclusive effect in this case for the additional reason that the United States' interest in securing water for the Newlands Project substantially conflicted with its trust obligation to the Tribe to obtain water to fulfill the purposes for which the Reservation was established, including the preservation of the fishery. In these circumstances it is entirely appropriate that the instant action to quiet title to a reserved water right for the fishery be permitted to proceed to the extent of allowing any such right to be satisfied, with an earlier priority date, out of the very water right that was decreed to the United States itself for the reclamation

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cute the claims for the project and the Reservation (see Pet. App. 244a-245a, 258a-259a) and, as the court of appeals held, "[i]t never relinquished or limited its representation of the Project's interests" (Pet. App. 245a).

In any event, TCID did not acquire any water rights of its own under the Truckee River Agreement. Rather, by virtue of Article 35 of its 1926 contract with the Secretary, TCID was given the right to divert to the project water that was decreed to the United States in *Orr Ditch*, and the Truckee River Agreement accordingly provides for TCID to exercise the rights decreed to the United States. See 81-2276 Pet. App. A-112 to A-114; see also *id.* at A-120 (defining "Truckee Canal Water" for purposes of the Agreement as that part of the flow of the Truckee River "decreed to the United States by the TRUCKEE RIVER FINAL DECREE [*i.e.*, *Orr Ditch*] for diversion into the Truckee Canal". Moreover, under Section 8 of the Reclamation Act, project water rights are appurtenant to the individual tract of land, and therefore do not accrue to an irrigation district such as TCID.

As the Tribe explains (Tribe Resp. Br. 25-32), it also is clear for these and other reasons that, contrary to TCID's contention (TCID Pet. Br. 42-48), the Truckee River Agreement did not work an extinguishment of the fishery right. There is no indication that any consideration was given to asserting such a right in connection with the Agreement. See also Govt. Br. in Opp. 24 n.19.

purposes that conflicted with fulfilling the trust obligation to the Tribe.

The United States has not lightly pursued this action to confirm the existence of a prior reserved water right for the Tribe. In no other case to our knowledge has the United States acted with regard to Indians as it did in the *Orr Ditch* proceedings. These unique circumstances occasioned a subsequent and thorough reexamination by the Executive of the continuing trust obligation of the United States to fulfill the purposes for which the Pyramid Lake Reservation was created, and thereafter caused the United States to file this suit. These same circumstances, we submit, compel affirmance of the judgment below.

1. The Interior Department Order setting aside the Reservation, later confirmed by Executive Order of the President, reserved the area, expressly "including Pyramid Lake," "for Indian use." 1 C. Kappler, *supra*, at 868. Since the Lake is "a body of water, the protection contemplated is meaningful only if the water remains; the water right reserved * * * was thus explicit, not implied." See *Cappaert* v. *United States*, *supra*, 426 U.S. at 140. Pyramid Lake has no outlet, and its water level is "determined by the balance and imbalance between inflow and evaporation." *United States* v. *Nevada*, *supra*, 412 U.S. at 536. Almost all of the inflow comes from the Truckee River. For this reason, a necessary corollary to the express reservation of the Lake itself was a corresponding reservation of sufficient Truckee River water to preserve the Lake in the form in which it was reserved for the Indians. Thus, when *Orr Ditch* was brought, it was manifest that any diversion of water from the Truckee would have a direct impact on the Lake and the Reservation.

We do not suggest, of course, that the reservation of Pyramid Lake for the benefit of the Tribe was a reservation of the full amount of water in the Lake or the Truckee River as of 1859. Such an interpretation would preclude any upstream diversions after that date. At the same time, it is clear that sufficient Truckee River water was reserved to fulfill the purposes of the express reservation of the Lake and the area surrounding it for the Tribe. As the United

States District Court for the District of Nevada held more than a century ago, (*United States* v. *Sturgeon*, *supra*), and as both courts below in this case likewise found (Pet. App. 83a, 199a), the Reservation was established and the Lake reserved to permit the Indians to benefit from their historic fisheries. See pages 2-3, *supra*.

The Executive officials responsible for the *Orr Ditch* litigation therefore had a duty to protect the Lake and instream flows in the Truckee to this extent. The district court in this case found, however, quoting the Acting Commissioner of Indian Affairs (J.A. 341; Pet. App. 206a), that it was the intention of the United States, through those officials, to protect the fishery only "insofar as it was 'consistent with the larger interests involved'" in the reclamation project (Pet. App. 185a; citation omitted). This despite a plea by a Special Supervisor of the Indian Service in Reno, who had studied the fishery problem and the origins of the Reservation, that the Indians had a prior right to water for the fishery and that this right should be asserted in *Orr Ditch* (J.A. 322-324; see also *id.* at 385-388, 474-475).

The district court also expressly found that the Interior Department was confronted with a "conflict of purposes" between "asserting large water rights for its reclamation projects" and "the performance of its obligations to protect the rights and interests of the Indians on the Pyramid Lake Paiute Indian Reservation"; that this conflict was "apparent" prior to and during the *Orr Ditch* proceedings; and that it was "resolved" by top-level Executive officials by subordinating Indian interests to those of the reclamation program (Pet App. 189a; see also *id.* at 165a-168a). The district court concluded, however, that the responsible Executive officials were authorized by the Reclamation Act to resolve the conflict administratively in this fashion and to "extinguish" the fishery water right by not asserting it in *Orr Ditch*, despite their awareness that the fishery was threatened (Pet. App. 161a-169a, 179a, 189a-190a).

The court of appeals reversed the district court's holding that Executive officials were authorized to subordinate Reservation interests to reclamation interests in the manner found by the district court (Pet. App. 214a-222a; see

pages 18-19, *supra*), and petitioners do not renew that argument here. But the court of appeals did not disturb the district court's factual finding that the responsible Executive officials had resolved the conflict of purposes with which they were confronted in favor of the reclamation project. Indeed, the court of appeals itself held that "[b]y representing the Tribe and the Project against the *Orr Ditch* defendants, the government compromised its duty of undivided loyalty to the Tribe" (Pet. App. 242a), and it described the government's actions as analogous to those of a "faithless fiduciary" (*id.* at 239a). In the circumstances of this case, and on the basis of the record, findings and conclusions below, we too must conclude that the United States plainly breached its trust obligation to the Tribe by proceeding in the face of this conflict of interests without first taking measures to ensure an opportunity for the Tribe's interests to be separately presented. This breach was of such a nature and magnitude that the decree in *Orr Ditch* cannot be given res judicata effect to bar reallocation to Reservation purposes of the water available to the United States itself under the *Orr Ditch* decree.

2. *Orr Ditch* was not a case in which there was ample water available in the watershed and therefore a case in which any adverse impact that satisfaction of the Tribe's prior reserved water right would have on other federal rights, and vice versa, was largely speculative. Compare *Arizona* v. *California*, 373 U.S. 546, 595-601 (1963). In such a case, it is entirely appropriate for the United States to proceed with its exclusive representation of the Tribe's interests. In *Orr Ditch*, by contrast, the conflict between the United States' trust obligation to protect Reservation resources for the benefit of the Tribe and of seeking water for the Newlands Project was direct, substantial, and, as the district court found, "apparent" (Pet. App. 189a).[30]

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[30] In arguing that there was no conflict of interest present, Nevada relies (Nev. Pet. Br. 44) on the district court's factual finding and legal conclusion that the government *lawyers* in *Orr Ditch* did not have a conflict of interest. See Pet. App. 189a-190a, 192a. This reliance misses the point. The question involved here is one of fiduciary obligations, not attorney ethics. The government lawyers in *Orr Ditch* had only

We do not suggest that the United States was required to forgo or abandon the *Orr Ditch* quiet title action altogether because of these conflicting interests. Important governmental interests required the United States to pursue the case. But these circumstances did not excuse the Secretary of the Interior and other Executive officials from their trust obligation, on behalf of the United States, to ensure that sufficient water would be available to fulfill the purposes of the Reservation.

In the case of a private trust, the trustee "bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981). The position of the United States varies to a limited extent, because Congress has charged the Executive officials responsible for administering and protecting property held in trust for an Indian Tribe with other responsibilities that on occasion may conflict with trust duties. But the fact that Congress has conferred other responsibilities on the Secretary does not suggest that it intended a departure from the ordinary fiduciary obligation to see that the beneficiary's interests are protected. In litigation in which other interests of the United States conflict with those of the Tribe, this fiduciary obligation must be fulfilled by ensuring an opportunity for the Tribe's own position to be presented by others who do not have such a conflict.

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one client: the United States. The client in turn had several interests in the *Orr Ditch* litigation, in its sovereign capacity with respect to the Newlands Project and in a fiduciary capacity as trustee for the Tribe. Once the conflict between these interests was resolved administratively by top-level Executive officials, the attorneys for the government who "carri[ed] out the decisions and directions of their superiors in the executive department" (Pet. App. 190a) did not have a conflict of interest in presenting that single position of their client to the court. But the district court's finding that the *attorneys* did not have a conflict of interest in presenting the eventual position of the United States does not undermine the force of the district court's other findings and the court of appeals' holding that the Secretary of the Interior, on behalf of the United States as trustee, had conflicting purposes in the *Orr Ditch* litigation (Pet. App. 165a-168a, 189a, 242a).

Thus, where, as in *Orr Ditch*, there is a direct and substantial conflict between the interests of the United States and the Tribe, the United States cannot properly proceed with litigation that is intended to bind the Tribe without taking appropriate measures to ensure that the Tribe's interests are protected. Such measures could include providing for the Tribe to be separately represented by counsel funded by the federal government (see, *e.g.*, *United States* v. *Candelaria*, 271 U.S. 432, 444 (1926); United States Department of the Interior, *Handbook on Federal Indian Law* 334 & n.54 (1958)); joining the Tribe as a party; or, at a minimum, ensuring that the Tribe has notice of the pendency of the action and of its right to intervene and be heard through its own counsel if it wishes to challenge the position of the United States as trustee (see, *e.g.*, *New Mexico* v. *Aamodt*, 537 F.2d 1102, 1106-1107 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). See 25 U.S.C. 376; *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331-332 (1980); *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-539 (1972); see also *Manygoats* v. *Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977); *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, 459 F.2d 1082, 1085 (4th Cir. 1972). Similarly, where the court knows or reasonably should know that the United States has other interests that conflict substantially with its trust obligation to the Tribe, the court should not permit the matter to proceed without furnishing the Tribe an opportunity to appear in its own name through separate counsel. Cf. *Wood* v. *Georgia*, 450 U.S. 261, 272 (1981); *Cuyler* v. *Sullivan*, 446 U.S. 335, 347 (1980).[31]

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[31] We note in this regard that the final decree in *Orr Ditch* was approved and entered by Judge Frank Norcross (Pet. App. 150a), who previously had appeared as counsel before the special master in *Orr Ditch* to argue against the government's claim that the water right on behalf of the Indians had a priority date of 1859 (J.A. 441, 447). Elthelbert Ward, one of the attorneys for the government in the case, had informed the Attorney General some 16 years earlier that Judge Norcross was "undoubtedly disqualified" from entering the final decree because of this prior participation (J.A. 441-442; see also *id.* at 447). See Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090, codified at 28 U.S.C. (1940 ed.) 24; 28 U.S.C. 455(b)(2); *Code of Judicial Con-*

There is every reason to believe that if the Tribe had appeared separately in *Orr Ditch* through its own attorneys, a prior reserved water right for the fishery would have been asserted. As we have noted, the Special Supervisor of the Reno Agency, apparently a non-lawyer, had urged that the government make precisely this argument.[32] Yet, although the district court held that the Tribe had the *capacity* to intervene in *Orr Ditch* (Pet. App. 186a), there is no indication that the Tribe was ever given notice of its right to be heard in the case or even of a right to take an active role in the government's presentation of the case. See pages 13-14, *supra*. In these circumstances, the decree in *Orr Ditch* cannot be given absolute preclusive effect.

We of course acknowledge—and endorse—the general rule that when the United States appears in a case in its capacity as trustee for an Indian Tribe, the representation of

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duct, Canon 3C(1)(b) (1972); *Laird* v. *Tatum*, 409 U.S. 824, 828 (1972) (memorandum of Rehnquist, J.); cf. *Schweiker* v. *McClure*, No. 81-212 (Apr. 20, 1982), slip op. 5 n.4, 9 n.11.

The attorney for the government at the time the final decree was entered, Roy W. Stoddard, also previously had been counsel for several other parties in *Orr Ditch*, as well as for TCID (J.A. 445, 477-480, 485). As the Tribe points out (Tribe Resp. Br. 22 n.13), as counsel for TCID, Stoddard had vigorously opposed the suggestion by Ethelbert Ward that a reserved water right be sought for 19,000 acres of irrigable lands of the Reservation. Exh. U-265; 8 Tr. 1047, 1059, reproduced at Tribe Resp. Br. App. 7-13. See page 12, *supra*.

[32] TCID and Nevada suggest that the government's failure to advance a prior reserved right for the fishery was reasonable because there was some question whether the reserved rights doctrine applied to Executive Order reservations (TCID Pet. Br. 30 n.15; Nev. Pet. Br. 6-7, 10, 36 n.43). This purported justification plainly is without merit in this case, because the United States in fact *was* advancing, and was awarded in the temporary decree in 1926 and the final decree in 1944, a prior reserved water right for the Pyramid Lake Reservation. TCID also suggests (TCID Pet. Br. 30 n.15) that it might have been unclear whether water was reserved for fishery purposes. This purported justification likewise is wholly without merit here because, as we have noted (see page 35, *supra*), there was an *express* reservation of Pyramid Lake for Indian use. Moreover, in *Winters* itself, in holding that the United States had authority to reserve water and exempt it from appropriation under state law, the Court cited *United States* v. *Winans*, 198 U.S. 371 (1905), which concerned a reservation of fishery rights. See also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 679-685 (1979).

the Tribe is "complete" and the resulting judgment binds the Tribe. See, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413, 444-446 (1912). This is consistent with ordinary principles of res judicata and trust law, under which the beneficiary of a trust is bound by and entitled to the benefits of the judgment in an action to which the trustee was a party. See *Restatement (Second) of Judgments*, *supra*, § 41(1)(a); see also *id.* § 41(1)(d); *Restatement of Judgments*, *supra*, § 85. But a trustee does not wholly bind the beneficiary where the trustee has other interests that conflict with those of the beneficiary. See, *e.g.*, C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4461, at 544 (1981).

There is no reason why a different rule should be fashioned in the case of Indians. Indeed, in *Heckman* itself, in which the Court held that the representation by the United States binds the Tribe, the Court cited (224 U.S. at 446) cases involving private trusts that recognize an exception from the rule binding the beneficiary in situations in which there was fraud or collusion between the trustee and the other party involved in the litigation or where the trustee had an interest in the matter. See *Kerrison* v. *Stewart*, 93 U.S. 155, 160 (1876); *Shaw* v. *Railroad Co.*, 100 U.S. 605, 613 (1879); *Beals* v. *Illinois, Missouri & T.R.R.*, 133 U.S. 290, 295 (1890). Thus, in *Kerrison*, the Court stated that "[u]ndoubtedly cases may arise in which it would be proper to have before the court the beneficiaries themselves, or someone other than their trustee to represent their interests." And in *Shaw*, the court held that where the trustee has an interest in the matter, "[s]light circumstances will sometimes be considered sufficient proof of wrong to justify setting aside what has been done." 100 U.S. at 613. This is such a case. The circumstances here are not "slight"; the evidence of an actual conflict resolved to the disadvantage of the Tribe is substantial. Cf. *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Wood* v. *Georgia*, *supra*, 450 U.S. at 271-272. Accordingly, the decree in *Orr Ditch* cannot wholly bind the Tribe.

There is no occasion here to consider the scope of this principle in other settings. In this case, the court of appeals has permitted the reserved water right to be asserted only as against the water available to the United States for the reclamation purposes that conflicted with the trust obliga-

tion to the Tribe. Requiring the trustee to restore to the beneficiary property that the trustee itself has acquired as a result of a breach of the duty of loyalty—or imposing a constructive trust on that property—is a standard remedy for such breaches. See *Restatement (Second) of Trusts* § 206 (1959); G. Bogert, *The Law of Trusts and Trustees* § 861, at 10-11, 17-19 (1982); 3 A. Scott, *The Law of Trusts* § 206 (3d ed. 1967).

We note, finally, that the problem presented by the unique circumstances of this case cannot be expected to recur. As other cases before the Court this Term amply demonstrate, Indian Tribes are now fully consulted regarding the adjudication of their water rights and take an active role in their presentation. See *Arizona* v. *San Carlos Apache Tribe*, No. 81-2147; *Montana* v. *Northern Cheyenne Tribe*, No. 81-2188; *Arizona* v. *California*, No. 8, Orig. In these and other cases, the United States will continue to assure that the Tribe is kept fully advised of the proceedings and given meaningful notice in situations in which its interests may diverge from those of the United States.

The Court has recently emphasized that res judicata applies only where there was a "full and fair opportunity" to litigate the cause of action in the prior proceeding. *Kremer* v. *Chemical Construction Corp.*, *supra*. Ordinarily, where a trustee appears in a suit, the beneficiary may be deemed to have had that full and fair opportunity for the litigation of the claim, because of the fiduciary responsibility of the trustee to protect his interests. But where the trustee was affected by a conflict of interest in the prior proceeding, the rationale for binding the beneficiary is absent. In fulfillment of the Nation's trust obligation to the Indians (see *United States* v. *Sioux Nation*, 448 U.S. 371, 415 (1980)), the Tribe—and the United States on its behalf—must now have the full and fair opportunity to assert the prior reserved water right claim.

C. THERE IS NO OCCASION TO DISTURB THE COURT OF APPEALS' HOLDING THAT FURTHER PROCEEDINGS ON REMAND SHOULD BE CONFINED TO A POSSIBLE REALLOCATION OF THE WATER AVAILABLE TO THE UNITED STATES IN *ORR DITCH*

The Tribe, as cross-petitioner, challenges the court of appeals' holding that the *Orr Ditch* decree bars the assertion of the fishery water right against the defendants in *Orr Ditch* and their successors in interest. The Tribe contends that the fishery right may be pressed against *any* users of Truckee waters (Tribe Cross-Pet. Br. 18-43). The United States does not join the Tribe in this broader submission. We accept the result of the decision below that the water rights of these other parties need not be disturbed in the circumstances of this case[33] and that further proceedings should be concerned only with satisfying any reserved water right for the Tribe out of the water available to the United States itself in *Orr Ditch*. The legal principles discussed in Points A and B support this result, which will also ensure that the disposition of the case will not have broad precedential effect. But a number of practical and equitable factors point in the same direction as well.

As the Tribe itself acknowledges (Tribe Resp. Br. 15-16), almost all of the other water users on the Truckee have rights with a priority date earlier than the 1902 priority date of the reclamation water right awarded to the United States in *Orr Ditch*. See also TCID Pet. Br. 8 & n.4. At the same time, the depletion at Derby Dam for reclamation purposes is by far the largest on the Truckee, averaging almost 2½ times the amount of all other depletions combined. See Tribe Br. in Opp. 2-3; Tribe Br. in Opp. App. 2a. Thus, as a practical matter the fishery water right would in any event be satisfied almost entirely out of Truckee River water that is now delivered for irrigation on the Newlands Project.

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[33] The United States did make the broader argument in the court of appeals. Gov't Br. 25-61.

Furthermore, any necessary litigation on remand would be simplified under the court of appeals' holding because the only water users affected would be those on the Newlands Project, who comprise a single class represented by TCID (J.A. 193-204, 206); it would not be necessary for the thousands of other Truckee River water users to take an active role. And if the district court determines on remand that water to maintain the fishery was reserved when the Reservation was established, that right could be integrated into current uses of Truckee water by means of the Secretary's continuing regulatory jurisdiction over the operation of Derby Dam, which would permit him to allocate Truckee water between Pyramid Lake and the Newlands Project in order to satisfy their respective demands in light of changing seasons and climatic conditions and the operations of other dams on the Truckee. In contrast, the integration of a reserved water right for fishery purposes with upstream water uses could be considerably more complex.

It is true that satisfaction of a prior reserved water right for the fishery out of the water made available to the United States for use in connection with Newlands Project would have some impact on the amount of water delivered to water users on the Newlands Project. But the extent of any such impact is speculative at the present time. The holding of the court of appeals that the suit may proceed to the merits to this limited extent does not, of course, settle the relative claims of the United States to water for the benefit of the Tribe and of individual water users on the Newlands Project. There has not yet been a determination by the courts below that a fishery water right in fact was reserved when the Reservation was established; if so, what the nature and extent of any such right might be; or the degree to which that prior right could be accommodated to the delivery of water to individual landowners on the Newlands Project.

As the court of appeals recognized (Pet. App. 249a), a fishery water right would by nature be more flexible than that required for other purposes, such as irrigation or municipal and industrial use, which require fixed quantities of water on a regular basis. The fishery, in contrast, would re-

quire a certain quantity of water only on the average over a much longer hydrological cycle, in order to maintain the level of the Lake and the concentration of dissolved solids over time. As a result, Truckee River water could be furnished to other water users during dry years without undue harm to the fishery. See also Tribe Resp. Br. 42-43.

As the court of appeals further observed (Pet. App. 245a), a number of other factors also might serve to mitigate any hardship to project water users. First, recognition of a prior reserved right to Truckee River water would have no effect on the Newlands Project's receipt of water from the Carson River, which furnishes the majority of the water for the project in any event. Similarly, the Secretary's operation of Stampede Reservoir on the Little Truckee River to protect the fishery, as required by the district court in Nevada, might minimize the need to reduce diversions at Derby Dam to accomplish the same end. See *Carson-Truckee Water Conservancy District* v. *Watt*, 549 F. Supp. 704 (D. Nev. 1982). Moreover, under the district court's equitable powers, it could provide for a reasonable period of transition to full satisfaction of the prior reserved water right, in order to avoid sudden disruption and to permit the institution of conservation measures or other adjustments on the Project. See *Weinberger* v. *Romero-Barcelo*, No. 80-1990 (Apr. 27, 1982).

Second, the Newlands Project has been thought to be relatively inefficient in its use of water, and improvements in water storage, distribution, and use "could result in substantial efficiencies to ameliorate any hardship to TCID" (Pet. App. 245a).[34] Cf. *Colorado* v. *New Mexico*, No. 80, Orig. (Dec. 13, 1982), slip op. 4-5 & n.7, 7-9; *Sporhase* v. *Nebraska*, No. 81-613 (July 2, 1982), slip op. 12-13. See generally Br. for Amici Curiae Sierra Club and Friends of the Earth 15-24. In this regard, Congress recently directed the Secretary to "encourage the consideration and incorporation of prudent and responsible water conservation meas-

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[34] See also *Pyramid Lake Paiute Tribe* v. *Morton*, *supra*, 354 F. Supp. at 257. But cf. *United States* v. *Alpine Land & Reservoir Co.*, *supra*, slip op. 12.

ures" for federal reclamation projects where economically feasible for the recipients of water (Reclamation Reform Act of 1982, Pub. L. No. 97-293, § 210, 96 Stat. 1268), and Article 7 of the 1926 contract with TCID obligates TCID and project water users to secure an economical use of water. See page 6, *supra*. The Bureau of Reclamation has studied ways in which water could be conserved by rehabilitating the project, and there have been suggestions that the federal government contribute to this effort through a program to rehabilitate project works. See 128 Cong. Rec. S4826 (daily ed. May 11, 1981) (remarks of Sen. Laxalt).

Third, Newlands Project water users—unlike other users of Truckee River water—have contracts with the United States. Although the doctrine of res judicata does not bar the recognition of a prior reserved water right for the Reservation, project water users might have a remedy against the United States if the Secretary's inability to deliver the quantity of water provided for in those contracts after satisfying the prior reserved water right for the fishery were deemed a breach of contract for which the United States is liable under the terms of the contracts (Pet. App. 245a-246a). See Article 35 of the 1926 contract; 28 U.S.C. (Supp. V) 1491; cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 689-690 (1981).

Finally, as the court of appeals observed (Pet. App. 246a), any hardship to project water users[35] was avoidable if the United States, TCID, or project water users had taken measures to ensure that the relative claims of the Tribe and project water users inter se would be determined in an appropriate adversarial manner. Moreover, the courts below found that the Reservation and reclamation interests of the United States conflicted and caused the United

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[35] The extent of hardship to project water users also must be considered in light of the fact that water is now being delivered to project land in excess of the 3.0 acre feet per acre limitation in the contracts governing the majority of land under project water rights, and also in excess of the 2.93 acre feet per acre limitation in the temporary decree in *Alpine* in effect between 1950 and 1980. See pages 4-5 and note 4, *supra*. The equities of project water users are far less substantial to the extent that a prior reserved water right would be realized out of water delivered in excess of these amounts.

States to breach its fiduciary obligation to the Tribe. TCID cannot rely on the asserted representation of the interests of project water users by the United States in *Orr Ditch* for purposes of securing the benefits of the judgment in favor of the United States and at the same time wholly disassociate itself from the consequences that asserted representation had on the competing interests of the Tribe that the United States had a fiduciary obligation to protect.

As TCID candidly concedes (TCID Pet. Br. 22-25), it opposed the government's assertion of reserved water rights for the Tribe because of a possible impact on the reclamation project, therefore making it manifest to TCID, even if not to the defendants in *Orr Ditch* (compare Pet. App. 191a, 238a), that the United States had conflicting interests in *Orr Ditch* with respect to the project and Reservation. Moreover, since, as the district court found, Executive officials subordinated the Tribe's interests to the advancement of the reclamation program, it is water users on the Project who have benefited from that conduct. In these respects, then, the water users represented by TCID are situated differently from other water users on the Truckee who do not derive their water from that decreed to the United States in *Orr Ditch*.

For the foregoing reasons, we believe that the court of appeals correctly confined the scope of further proceedings to a possible reallocation of the water decreed to the United States in *Orr Ditch*. We respect the concerns of water users on the Newlands Project, and the Secretary accordingly will work closely with all parties in an effort to mitigate the impact on project water users of the implementation of a prior reserved water right to preserve the Pyramid Lake fisheries. But because Congress has not authorized the diminution of the Pyramid Lake Reservation (25 U.S.C. 398d; 25 U.S.C. 177), we—and the Court—must respect as well the fiduciary obligation of the United States to protect these historic fisheries for the benefit of the Indians who have depended upon them from time immemorial and whose Reservation was established in and around Pyramid Lake for the specific purpose of enabling them to derive their sustenance from its fish.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General
CAROL E. DINKINS
Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
ROBERT L. KLARQUIST
DIRK D. SNEL
Attorneys

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